CONSOLIDATION COAL CO.
GULF OIL CORP.

IBLA 84-247 Decided June 25, 1985

Appeals from decision of the Utah State Office, Bureau of Land Management, overruling in part objections to readjustment of coal leases U-073039, U-073040, and U-073041.

Reversed and remanded.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   A Federal coal lease which is subject to readjustment subsequent to enactment of the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), will be conformed upon readjustment to the terms required by that statute.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   Regulation 43 CFR 3451.1(c)(1) specifically provides that a notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of the initial 20-year period for leases issued prior to Aug. 4, 1976. Where BLM fails to provide such notice to a lessee holding a 50-percent undivided interest in a lease and the record indicates the lessee did not have actual knowledge of BLM's intent to readjust on or before the anniversary date of the lease, the lease may not be readjusted.

APPEARANCES: Daniel L. Fassio, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company, appellant; Brian E. McGee, Esq., Denver, Colorado, for appellants; Sheryl L. Katz, Esq., Officer of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Consolidation Coal Company (Consol) and Gulf Oil Corporation (Gulf) appeal from a decision of the Utah State Office, Bureau of Land Management

(BLM), dated December 7, 1983, overruling in part their objections to the readjustment of coal leases U-073039, U-073040, and U-073041.

Coal leases U-073039, U-073040, and U-073041 were all issued effective June 1, 1962, to Kemmerer Coal Company (Kemmerer) pursuant to section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1962), for lands in Emery and Sevier Counties, Utah. In 1966, an assignment to Consol of an undivided one-half interest in all three leases was made by Kemmerer and approved by BLM. 1/ In 1976, the Federal Coal Leasing Amendments Act (FCLAA), 30 U.S.C. §§ 201-209 (1982), was enacted to impose new or additional requirements on Federal coal leases when issued or readjusted. After compiling an environmental assessment report in preparation for revision of the leases in conjunction with the twentieth anniversary of the lease date, BLM sent Consol a notice, dated December 10, 1981, of its intent to readjust the leases. A copy of this notice was not sent to Kemmerer. On December 31, 1981, Kemmerer was liquidated and its interests in the subject leases were distributed to Gulf. 2/ Pursuant to 43 CFR Subpart 3453, Gulf filed an application on March 3, 1982, for approval of Kemmerer's assignment of its undivided one-half interest in each lease. This assignment was not approved until January 21, 1983. Meanwhile, the initial 20-year period expired for the leases on June 1, 1982, without any additional notice to the lessees concerning readjustment. On July 27, 1982, BLM sent a notice of the proposed terms and conditions under readjustment to Consol. A similar notice was sent to Kemmerer on September 16, 1982, and represented the first announcement from BLM to Kemmerer on the subject of readjustment. Both Consol and Gulf filed written objections to the proposed readjustment within the period allowed by BLM. In its December 7, 1983, decision, BLM overruled several specific objections to lease terms through reference to recent decisions of this Board addressing those issues. Because some of Consol's objections were supported by Departmental policy and Board decisions, BLM agreed to revise the readjusted leases accordingly. With respect to Gulf's arguments, BLM denied its objection that Kemmerer was not notified prior to the readjustment date because a letter dated June 9, 1982, from Gulf to BLM indicated that notice of the intent to readjust had been received.

In a joint statement of reasons, Consol and Gulf challenge BLM's authority to readjust the terms and conditions of these leases. They primarily assert that the Department is barred from readjustment by its failure to notify the lessees of the intent to readjust and that the provisions of FCLAA cannot be applied to their pre-FCLAA leases. Appellants additionally argue that the purported readjustment abrogates their contractual rights and present specific objections to certain terms of the readjusted leases.

1/ After a one-half undivided interest in each of these leases was assigned to Consol, it assigned the production payment interest in each to William Coal Company. The aspects of that assignment do not affect this decision.

2/ Gulf and the Pittsburg & Midway Coal Mining Company (P&M), a subsidiary of Gulf, acquired control of Kemmerer in July 1981 and forced the December 1981 liquidation and distribution of its assets to the stockholders. Kemmerer's interests in the subject coal leases were received by Gulf on liquidation. Gulf subleased these interests to P&M pending BLM's approval of the assignment and sublease.

[1] It is established that FCLAA and its implementing regulations apply to coal leases issued prior to enactment of the statute, i.e., August 4, 1976, when those leases are readjusted after that date. Sunoco Energy Development Co., 84 IBLA 131 (1984); Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984); Coastal States Energy Co., 81 IBLA 171 (1984). Consistent with the readjustment authority reserved to the United States in section 7 of the Mineral Leasing Act, as amended, 30 U.S.C. § 207 (1982), BLM may readjust coal leases in conformity with FCLAA and its implementing regulations where it abrogates prior existing contractual rights. Coastal States Energy Co., supra at 173. A decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands. Mid-Continental Coal & Coke Co., supra at 59, and cases cited therein.

In order for BLM to establish specific terms and conditions upon readjustment, it must provide notice of intent to readjust prior to the expiration of the initial 20-year period. Pitkin Iron Corp., 81 IBLA 81 (1984); Kaiser Steel Corp., 76 IBLA 387 (1983). See Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 953 (10th Cir. 1982). Gulf argues that readjustment is barred because BLM failed to send a copy of the notice of intent to readjust to its predecessor, Kemmerer. The Board sought additional briefing of this issue by appellants and counsel for BLM because of the novelty of the issue raised by Gulf's argument, viz., whether, where coal leases are held by two lessees, each of which owns an undivided 50-percent interest in the leases, failure to notify one of the lessees of a proposed lease readjustment invalidates the notification and thus bars lease readjustment. 3/

The provisions for readjustment of coal lease terms and conditions found at 30 U.S.C. § 207 (1982) provide in part: "Such rentals and royalties and other terms and conditions will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." (Emphasis added.) Under this statutory language, a coal lease may not be readjusted unless notice of the readjustment or the intent to readjust is given on or prior to the pertinent anniversary date of the lease. Rosebud Coal Sales Co. v. Andrus, supra at 953. BLM asserts that receipt of actual notice was acknowledged as follows in a letter from Gulf to BLM, dated June 9, 1982: "Gulf Oil Corporation owns 50% of the record title interest in Utah Federal Coal Leases, U-73039, U-73040, U-73041. The readjustment date for these leases was June 1, 1982. Notice of intention to readjust was received, but we have not received the proposed readjusted lease terms." BLM rendered its decision to deny Gulf's objections on the grounds that "[p]resumably this letter had been received prior to the readjustment date, as no objection was made at that time."

3/ Appellants argue that since BLM did not file an answer within the time prescribed by 43 CFR 4.414, it cannot participate in the proceedings. However, this provision does not preclude the Board from requesting BLM and appellants to submit additional comments on novel issues provided neither party is prejudiced. No prejudice has been shown in this case.

The pertinent portion of the Departmental regulation regarding coal lease readjustment is found at 43 CFR 3451.1 which reads as follows:

> (c)(1) The authorized officer shall, prior to the expiration of the current or initial 20-year period or any succeeding 10-year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial 20-year period or any succeeding 10-year period thereafter. On such a lease the failure to so notify the lessee shall mean that the United States is waiving its right to readjust the lease for the readjustment period in question. [Emphasis added.]

See 43 CFR 3451.1(d)(1) (1981). It is well established that a duly promulgated regulation has the force and effect of law, is binding on the Department, and may not be waived. Joseph J. C. Paine, 83 IBLA 145 (1984); Chugach Natives, Inc., 80 IBLA 89 (1984); Sierra Club, Alaska Chapter, 79 IBLA 112 (1984). See also Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621 (1950); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). Accordingly, pursuant to the provisions of the regulation, BLM must notify the lessee of an intent to readjust on or before the anniversary date or the opportunity to do so will be waived. In this case there is no question that BLM failed to send notice of its intent to readjust to either Kemmerer or to Gulf. The record does establish, however, that Gulf had actual knowledge of BLM's intent to readjust.

In Nebesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (1984), the Board recognized the principle of notice based upon actual knowledge. Therein, the Board held BLM's failure properly to serve its decision on the affected party was cured by the fact that the authorized agent of the party had actual knowledge of the decision. See Village and City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984) (presence of a village president and city mayor at a hearing confirmed that they had actual notice of the hearing and that there was no denial of due process).

A person is deemed to have notice when he has actual knowledge. Leasing Service Corp. v. Diamond Timber, Inc., 559 F. Supp. 972, 978 (S.D.N.Y. 1983), aff'd, 729 F.2d 1442 (2nd Cir. 1983). One is chargeable with the actual notice which one has. Cheatham v. Carter County, 363 F.2d 582, 585 (6th Cir. 1966). See Sands v. United States, 198 F. Supp. 880, 884 (W.D. Wash. 1960), aff'd sub nom. First Federal Savings & Loan Association of Bremerton v. United States, 295 F.2d 481 (9th Cir. 1961); 66 C.J.S. Notice § 3 (1950) (defining actual notice).

[2] In this case the June 9, 1982, letter from Gulf to BLM clearly exhibited that Gulf had actual knowledge of BLM's intent to readjust the leases in question. The crucial question for purposes of this case, however, is whether Gulf gained such knowledge on or before June 1, the anniversary date of the lease. In this regard the Board issued an order directing Gulf to provide an affidavit of a knowledgeable official concerning when Gulf became aware of BLM's intent to readjust.

On April 12, 1985, the Board received the affidavit of David M. Cover stating:

1. I am the Coordinator, Government Lands for The Pittsburg & Midway Coal Mining Co., a wholly owned subsidiary of Gulf Oil Corporation;

2. On June 9, 1982 I wrote a letter to Robert Lopez, Chief, Mineral Section, Utah State Office, BLM, concerning the readjustment of three Utah Federal coal leases - U-073039, U-073040, and U-073041;

3. I had not seen a copy of a notice of intent to readjust those leases on or before June 9, 1982, the date on which I wrote the letter referred to in No. 2 above;

4. I was aware that a notice of intent to readjust had been sent to Consolidation Coal Company, which held fifty percent (50%) of the record title of the Federal coal leases concerned;

5. I do not remember how I learned that Consolidation Coal Company had received the notice of intent. I probably spoke with someone at Consolidation Coal or had a Gulf land agent residing in Salt Lake City check the BLM records;

6. To the best of my knowledge and belief I did not know on June 1, 1982 whether or not Consolidation Coal Company had received a notice of intent to readjust;

7. Upon learning that a notice of intent to readjust had been sent to Consolidation Coal, I assumed, in accordance with practices that were in effect when I was employed by the Bureau of Land Management at the New Mexico State Office in Santa Fe, New Mexico, that a copy of the notice of intent was sent to all owners of record title in the Federal coal leases;

8. Request for approval of the assignment of leases U-073039, U-073040, and U-073041 from The Kemmerer Coal Company to Gulf Oil Corporation had been submitted to the Utah State Office of the Bureau of Land Management under cover of a letter dated February 26, 1982;

9. On June 9, 1982 the assignments of record title had not yet been approved and record title, according to BLM records, was still held by The Kemmerer Coal Company. The assignments were approved effective February 1, 1983;

10. I assumed that since record title in the leases was still shown to be held by The Kemmerer Coal Company, the BLM had mailed the notice of intent to the Frontier, Wyoming office of Kemmerer, but I later learned that no such notice was sent to or ever received by Kemmerer or Gulf.

BLM provided no response to this affidavit. We must conclude, therefore, that BLM has failed to demonstrate that either Kemmerer or Gulf had actual knowledge of BLM's intent to readjust on or prior to June 1, 1982.

Even though notice was delivered to Consol only, BLM insists that the regulations have been complied with since a lessee was notified and suggests that readjustment cannot be barred simply because Consol failed to inform Kemmerer or Gulf of the notice. 43 CFR 3451.1(c)(1) directs BLM to notify "the lessee." According to the record, 4/ Consol is a lessee entitled to receive notice which would satisfy the provisions of the regulation. Consol is also identified as the principal operator under the lease. However, under the Department's general rules of construction, any word importing the singular also includes and applies to the plural condition unless otherwise indicated. 43 CFR 1810.1. The coal lease management regulations contemplate situations where more than one party may at the same time possess interests in the leases, i.e., "[L]eases may be transferred in whole or in part." 43 CFR 3453.1(a) (emphasis added). A partial assignment is one which effects a transfer of (1) an undivided interest in the entire leasehold, (2) an undivided interest in a portion of the leasehold, or (3) an entire interest in a portion of the leasehold. An assignment of the entire interest in a definitely described portion of the lands in a lease segregates the assigned and the retained portions into separate and distinct leases, but an assignment of an undivided interest in the entire leasehold does not. See 43 CFR 3453.2-5. Thus, the unqualified term "lessee" in this situation is representative for all the parties claiming ownership in the undivided lease.

A lease to two or more in such manner that they have an undivided right to possession creates a tenancy in common. Since there is no agency relationship between tenants in common, it is clear that one of them cannot ordinarily bind his cotenants by contracts with third persons unless authorized to do so. 20 Am. Jur. 2d Cotenancy and Joint Ownership §§ 26-28 (1965). Accordingly, notice to one tenant in common with respect to the title of the common property is not binding on his or her cotenants unless it can be shown that other arrangements have been made. 86 C.J.S. Tenancy in Common § 130 (1954). Therefore, when an undivided one-half interest was assigned to Consol, two separate and distinct lessees to the leases at issue became subject to recognition by BLM. The record does not disclose that either lessee has assumed authority to act for the other. In fact, the record shows that the pattern established by BLM was to send separate notices concerning the leases to the respective addresses of record, i.e., to Pittsburgh, Pennsylvania, for Consol and to Frontier, Wyoming, for Kemmerer. (See BLM notices dated Feb. 20, 1968; July 13, 1977.)

Without providing an explanation for the record, BLM sent an explanatory letter concerning the leases in March 1980 to only Consol's address. There is no indication that Kemmerer was ever notified of the contents of that letter. Moreover, there is nothing to indicate that the co-lessee relationship was arranged to permit Consol to receive notice for Kemmerer (or

4/ When a reference to the record is made in this discussion, it includes the separate case files prepared for each lease and all other materials intended for inclusion in the determination of this appeal.

Gulf). Since an agency relationship was not set forth in the record and BLM had established a pattern of transmitting separately to both lessees, we must conclude that the December 10, 1981, notice to Consol could not qualify as a notice sent also to Kemmerer.

When the December 10, 1981, notice of intent to readjust was prepared and sent to Consol, Kemmerer had not been liquidated. Counsel for BLM observes that "BLM may have known of the impending liquidation and not known where to send its notice." (Response to Statement of Reasons at 2, note 1). However, nothing in the record substantiates that BLM had been officially alerted to changes in Kemmerer's corporate status at that time. 5/ A party is deemed to have received a communication or transmittal from BLM when such is delivered to its last address of record. This principle applies even where no forwarding address is supplied. 43 CFR 1810.2(b). See Arthur M. Solender, 79 IBLA 70, 72-73 (1984). Because Kemmerer did not declare a change in address for the record, BLM's obligations under 43 CFR 3451.1 would have been satisfied if it had sent a copy of the notice of intention to readjust the leases to the last address of record. 6/ Further, when Gulf notified BLM of its substitution for Kemmerer, BLM was alerted to interests and concerns in the leases separate from those belonging to Consol. In usual practice, the assignor of an interest in a coal lease remains the lessee of record and retains responsibility for lease obligations until approval of the transfer. See 43 CFR 3453.2-4(b), 3453.3-3. Cf. Harry C. Peterson, 75 IBLA 195, 197 (1983) (assignor of oil and gas lease remains responsible for any and all obligations under the lease prior to approval of assignment). As a consequence of the liquidation of Kemmerer, however, the lease was assigned by operation of law and the defunct entity known as Kemmerer Coal Company could no longer function as the lessee. Rather, Gulf, as the successor to Kemmerer's corporate responsibility, was empowered to fill this void and perform Kemmerer's duties as a lessee of record pending BLM's decision on the application for approval of assignment. BLM had sufficient opportunity between the time it became aware of Kemmerer's liquidation and management of its interests in the leases by Gulf and the June 1, 1982, anniversary date to transmit a copy of the notice to readjust to Gulf. No reason is provided in the record for BLM's neglect to send the necessary notice to Kemmerer's address of record or to Gulf during the 6-month period after notice was delivered to Consol.

We find that because of BLM's failure to provide notice, as required by 43 CFR 3451.1(c)(1), to Kemmerer or its successor in interest, Gulf, the right to readjust the leases in question was waived. The failure to provide

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5/ In fact, the statement by counsel for BLM is belied by the record which shows that on Sept. 16, 1982, BLM sent a decision to The Kemmerer Coal Company, Frontier, Wyoming, setting forth the readjusted terms and conditions for the leases in question. The decision states: "By notice dated December 10, 1981, Consolidation Coal Company was advised that the terms and conditions of the readjustment would be provided no later than two years from the date of that notice."

6/ Kemmerer's declared address of record appeared unchanged beginning with the leases and continuing throughout the entire record as: Kemmerer Coal Company, Frontier, Wyoming 83121.

notice was not cured by Gulf's actual knowledge of the intention to readjust, since the record indicates that knowledge was not acquired on or before June 1, 1982, the anniversary date of the leases.

Waiver of the right to readjust relates only to the readjustment period in question. The Department may readjust the leases at the next appropriate period in accordance with procedural guidelines then in effect.

Since we hold that BLM lacked authority to readjust the terms and conditions of the leases in question because of a failure to provide appropriate notice to all the lessees of record on or before June 1, 1982, it is unnecessary to address appellants' specific objections to the proposed lease terms and conditions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is reversed and the case remanded for appropriate action.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING IN THE RESULT:

While the result reached by the majority opinion is correct, the discussion by the majority concerning the importance of Gulf's actual knowledge, if it existed, of BLM's intention to adjust these leases is mistaken. Rather, the narrow issue posed by this appeal is whether the regulation must be satisfied by direct notice or if actual notice acknowledged by the party to be served is sufficient.

Regulations, like statutes, must be construed to effectuate the intent of the enacting body. Atlantic Richfield Co., 16 IBLA 329, 338, 81 I.D. 457, 461 (1974). See also United States v. Ray, 488 F.2d 15, 18 (10th Cir. 1973); Rucker v. Wabash Railroad Co., 418 F.2d 146, 149 (7th Cir. 1969). The same rules of construction pertaining to statutes are also applicable to regulations. 2 Am. Jur. 2d Administrative Law § 307 (1962); Sutherland Statutory Construction §§ 31.06, 49.03 (4th ed. 1972). To effectuate the intent of the enacting body in construction of a regulation or statute, it is necessary to first look to the plain language of the rule and the purpose behind its enactment. Rucker v. Wabash Railroad Co., supra. The regulation at issue simply states that BLM shall notify the lessee. However, when this provision was promulgated the following preamble to the rulemaking was supplied by its drafters:

> As evidenced by section 3451.1(d), the Department of the Interior is meeting the concern behind the industry objections by providing that beginning with June 1, 1980, failure to notify the lessee of readjustment prior to the readjustment anniversary date will constitute a waiver of the right to readjust. In turn, this provision was roundly criticized by public interest groups in their comments because they regarded it as an abrogation of authority. The Department's position is that while it is wholly lawful to readjust existing leases that were not readjusted on, or where notification of readjustment did not occur before, their anniversary dates, the Department will beginning with June 1, 1980, assure timely and competent administration of leases by self-imposition of the sanction of waiver. This will guarantee accountability, and will prevent any future situation like that which prevailed with respect to lease readjustments during the early 1970's. On such leases, the notice whether the lease will be readjusted or not will be sent prior to the readjustment anniversary date, or the opportunity to readjust will be lost. [Emphasis added.]

44 FR 42601-02 (July 19, 1979). The emphasized language establishes that the promulgators of this rule intended that actual transmission of the notice determines whether or not the lease can be readjusted. As a general rule, where a method of giving notice is prescribed, there must be proper compliance with the prescribed method in order to prevent disputes over whether notice was received. See 66 C.J.S. Notice § 16 (1950).

In Nebesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (1984), relied upon by the majority for its position concerning notice, the Board

held BLM's failure to properly serve its decision upon an affected party was offset by actual notice of the decision acknowledged by the authorized agent for that party. However, in that case the affected party was obligated to act by filing its appeal "within thirty (30) days of the receipt of [the] decision." The activity focused upon was the receipt of the decision by the affected party and that requirement, therefore, was satisfied by the actual notice received. The regulation at issue here, however, focuses upon acts to be performed by BLM. Nebesna, therefore, cannot be applied to this case, because the regulatory scheme simply does not permit it.

The notice provision of 43 CFR 3451.1(c)(1) unequivocally requires the giving of notice. This requirement cannot be excused by resort to an "actual knowledge" theory of notice-giving in any case. To the extent the majority opinion opens the way to such a holding in the future it is mistaken.

Franklin D. Arness
Administrative Judge